

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 26, 2007

STATE OF TENNESSEE v. ROBERT LEE DAY

Appeal from the Circuit Court for Blount County
No. C-15588 D. Kelly Thomas, Jr., Judge

No. E2006-02609-CCA-R3-CD - Filed November 19, 2007

The defendant, Robert Lee Day, appeals the Blount County Circuit Court's revocation of his two-year probation. The defendant claims the trial court lacked grounds for ordering revocation. Finding no abuse of discretion, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Mack Garner, District Public Defender (at trial); and J. Liddell Kirk, Assistant District Public Defender (on appeal), for the appellant, Robert Lee Day.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Mike Flynn, District Attorney General; and Andrew D. Watts, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant pleaded guilty to violation of the Motor Vehicle Habitual Offenders Act, see T.C.A. § 55-10-613, on December 5, 2005. Pursuant to a plea agreement with the State, the defendant received a sentence of two years, suspended to supervised probation. As a condition of his plea agreement, he was to undergo a drug and alcohol assessment and follow all rules of probation.

On November 6, 2006, the State filed a probation violation warrant alleging that the defendant claimed to be on medical leave from work when in fact he had been fired for missing three consecutive days; that he had failed to report as instructed to Knox County Criminal Court on October 27, 2006; that he had failed to pay probation fees since July 7, 2005; and that he had failed to make any payments toward court costs.

The trial court began the probation revocation hearing on December 4, 2006. Beverly Kerr with the State of Tennessee Board of Probation and Parole testified that she began supervising the defendant on November 28, 2005. Ms. Kerr testified that the defendant owed \$800 in probation fees, had yet to make any payment towards court costs, and had completed only five out of two hundred hours of community service. She testified that on October 25, 2006, the defendant met with members of the Board of Probation and Parole at an administrative review hearing. At this meeting, he reported he had been terminated from his job at SeaRay because he was deemed a medical risk. When asked to provide documentation of the termination at a court hearing held on October 27, 2006, the defendant failed to appear. Ms. Kerr testified that “a phone call” to SeaRay Human Resources indicated the defendant was fired for missing three consecutive days of work, not for a health related concern.

The defendant testified that he worked for SeaRay for five and a half months as a “gel coater” working twelve-hour days during the week before he had to leave the job due to work-related lung problems. His doctor ordered him to stay home for a week and a half, and he called in sick to work every day but the last three. The defendant testified that his failure to pay the probation fees and court costs was due to high gas prices and the increase in gas usage necessitated by his wife doing the driving. He testified that he missed the October 27, 2006 court hearing due to a reaction to steroids and antibiotics given to him at a hospital and that he called and left a message with a courthouse secretary. Finally, he testified he could not do his community service on the weekends because on Saturdays he was too dehydrated and undernourished from the work week, and on Sundays he had to prepare for work early Monday morning.

On cross examination, the defendant testified that he did not possess all the medical documentation relating to his illness. He also admitted to being dishonest about his employment with SeaRay, not paying his probation fees and court costs, and failing to complete the community service.

The trial court ruled that the defendant violated probation by missing meetings, lying, and not making progress on his community service obligation. Thus, the court revoked probation and ordered him to serve his sentence in confinement.

The defendant filed a timely notice of appeal, challenging the revocation on the grounds that the evidence was insufficient to support the trial court’s findings.

The standard of review upon appeal of an order revoking probation is abuse of discretion. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). For an abuse of discretion to occur, the reviewing court must find that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the terms of probation has occurred. *Id.*; *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The trial court is required only to find that the violation of probation occurred by a preponderance of the evidence. T.C.A. § 40-35-311(e) (2006). Upon finding a violation, the trial court is vested with the statutory authority to “revoke the probation and suspension of sentence and cause the defendant to commence the execution of the

judgment as originally entered.” *Id.* Furthermore, when probation is revoked, “the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of the suspension.” *Id.* § 40-35-310.

Having considered the defendant’s arguments, we are unpersuaded that the trial court abused its discretion.

In the present case, substantial evidence supports the trial court’s conclusion that the defendant violated his probation. In addition to the testimony from Ms. Kerr, the defendant himself admitted to being dishonest about his past job, not paying probation fees or court costs, and not progressing in his community service requirement. The defendant’s assertion that he only missed one meeting does not excuse his failure to satisfy other obligations of his probation. We hold that the trial court did not abuse its discretion by revoking the defendant’s probation and ordering him to serve his sentence in confinement. Accordingly, the judgment of the trial court is affirmed.

JAMES CURWOOD WITT JR., JUDGE